MALAYSIAN REPORTS

Lim Thean Lee v Inspector General of Police & Ors

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-200-90
HASHIM YEOP A SANI CJ (MALAYA), HARUN HASHIM SCJ AND LC VOHRAH J
29 OCTOBER 1991

Preventive Detention — Removal from place of detention — Whether order of minister required — Persons removed from place of detention to attend enquiry by Advisory Board under art 151 of Federal Constitution — Dangerous Drugs (Special Preventive Measures) Act 1985, ss 15 & 16

The appellant, who had been detained under the Dangerous Drugs (Special Preventive Measures) Act 1985, had been removed from the place of detention to attend the enquiry by the Advisory Board constituted under art 151 of the Federal Constitution. No order of the minister had been issued under s 15 or s 16 of the Act and it was argued that the removal to attend the enquiry by the Advisory Board without an order of the minister rendered their further detention unlawful. The application of the appellant was dismissed by the learned judicial commissioner in the High Court and the appellant appealed.

Held, dismissing the appeal:

(1) It is not necessary to have the authorization of the minister to take the detainee out of the place of detention for the purpose of attending the inquiry by the Advisory Board as the appellant had a constitutional right to attend the proceedings before the Advisory Board.

(2) Section 16(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 gives a discretion to the minister which discretion he may or may not exercise depending on the facts of each case. It has however no application to an enquiry of the Advisory Board under art 151 of the Federal Constitution.

[Bahasa Malaysia summary

Perayu yang telah ditahan di bawah Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985, telah dikeluarkan dari tempat tahanannya untuk menghadiri siasatan oleh Lembaga Penasihat yang ditubuhkan di bawah perkara 151 Perlembagaan Persekutuan. Perintah menteri tidak dikeluarkan di bawah s 15 atau s 16 Akta itu dan telah dihujahkan bahawa pengeluaran perayu untuk menghadiri siasatan oleh Lembaga Penasihat itu tanpa perintah menteri telah menjadikan tahanan selanjutnya itu tidak sah. Permohonan kepada yang arif persuruhjaya kehakiman di Mahkamah Tinggi telah ditolak dan perayu membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Tidaklah perlu mendapatkan kebenaran menteri untuk mengeluarkan orang yang ditahan dari tempat tahanannya untuk menghadiri siasatan oleh Lembaga Penasihat kerana perayu mempunyai hak yang diberi oleh Perlembagaan untuk menghadiri prosiding di hadapan Lembaga Penasihat itu.

(2) Seksyen 16(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 memberi budibicara kepada menteri yang boleh digunakannya atau tidak bergantung kepada keadaan tiap-tiap kes. Bagaimanapun ia tidak terpakai kepada siasatan Lembaga Penasihat di bawah perkara 151 Perlembagaan Persekutuan.]

Cases referred to

1 *Lim Yack Boon* lwn *Timbalan Menteri Dalam Negeri, Malaysia & Satu Yang Lain* [1990] 3 MLJ (overd)
2 *Oo Hua Lai* lwn *Menteri Hal Ehwal Dalam Negeri, Malaysia & Satu Yang Lain* [1990] 3 MLJ 175 (refd)
3 *Tan Haai Yang* v *Timbalan Menteri Dalam Negeri & Anor* Penang High Court Criminal Application No 440-61-89 (refd)

Legislation referred to

Dangerous Drugs (Special Preventive Measures) Act 1985 ss 15, 16
Federal Constitution art 151

Appeal from: Criminal Application No 44-56-89 (High Court, Muar)

Karpal Singh for the appellant.
Suriyadi bin Halim Omar (Senior Federal Counsel) for the respondents.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): This appeal was against the decision of the learned judicial commissioner, R Talalla (as he then was), who dismissed the appellant's application for habeas corpus and who also dismissed 22 other similar applications (Criminal Application Nos 44-43 of 1989, 44-66 of 1989, 44-85 of 1989, 44-18 of 1990, 44-31 of 1990, 44-51 of 1990, 44-52 of 1990, 44-53 of 1990, 44-79 of 1990, 44-81 of 1990, 44-83 of 1990, 44-89 of 1990, 44-93 of 1990, 44-94 of 1990, 44-97 of 1990, 44-99 of 1990, 44-100 of 1990, 44-101 of 1990, 44-103 of 1990, 44-121 of 1990, 44-124 of 1990 and 44-132 of 1990).

All the applications before the learned judicial commissioner raised a common point of law and the sole point was whether the provisions of ss 15 and 16 of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act') had been breached.

In all these cases all the applicants were subjects of detention orders made under s 6(1) of the Act and all were removed from the place of detention to attend the enquiry by the Advisory Board constituted under art 151 of the Federal Constitution. It was contended on their behalf that the removal to attend the enquiry by the Advisory Board without an order of the minister under s 15 or s 16 of the Act rendered their further detention unlawful.

The appellant relied on *Lim Yack Boon* lwn *Timbalan Menteri Dalam Negeri, Malaysia & Satu Yang Lain*[1] where Ahmad Fairuz JC (as he then was), ruled that the applicant was entitled to an order of habeas corpus because the respondents had failed to follow the requirements of s 16 of the Act which he said required the minister to issue an order before the applicant could

be brought to Pulau Jerejak to attend the review enquiry by the Advisory Board. The applicant was then detained at the Pusat Pemulihan Akhlak, Muar, Johore.

Lim Yack Boon[1] was subsequently followed by the Penang High Court in *Oo Hua Lai* lwn *Menteri Hal Ehwal Dalam Negeri, Malaysia & Satu Yang Lain.*[2] There Abdul Hamid JC was dealing with an application for habeas corpus in respect of a detainee under the Emergency (Public Order and Prevention of Crime) Ordinance 1969.

In *Oo Hua Lai*[2] the applicant was arrested pursuant to s 3(1) of the Emergency Ordinance 1969 and the Deputy Home Affairs Minister issued an order under s 4(1) of the said Ordinance directing the applicant be detained for two years in the Pulau Jerejak Rehabilitation Centre or such other places as may be directed by the minister from time to time. However during the duration of the said detention the applicant was taken out of the centre on several occasions to attend court proceedings in the Melaka magistrate's court as a witness without any order from the minister or the deputy minister under s 12 or s 13 of the said Ordinance. The learned judicial commissioner held that by taking the applicant out and detaining him in places other than that mentioned in the detention order without an order from the minister under s 12 or s 13, the respondent had not complied with the detention order and the provisions of ss 4(2), 12 and 13 of the Ordinance. The result was that the applicant's detention in other places during those times was not done in accordance with the law and was illegal. In his judgment the learned judicial commissioner referred to *Lim Yack Boon*[1] and said that he agreed with the decision therein.

In our view *Oo Hau Lai*[2] was correctly decided on the facts and the law applicable in that case. But we are of the view that the learned judicial commissioner in *Lim Yack Boon*[1] did not construe ss 15 and 16 of the Act correctly.

Sections 15 and 16 of the Act read as follows:

> 15(1) The Minister may by order direct the removal from any place of detention to another place of detention to be specified in such order of any person detained under subsection (1) of section 6, to be there detained under subsection (1) of section 6, or under subsection (1) section 11A, to be there detained for the whole or any part or parts of such period for which it has been ordered that such person shall be detained.
>
> (2) Any person in the course of removal under subsection (1) shall be deemed to be in lawful custody.
>
> 16(1) On proof to his satisfaction that the presence at any place of any person detained under subsection (1) of section 6, or under subsection (1) of section 11A, or lawfully in the custody of the police or confined in any prison whether under subsection (1) of section 6, or under an order of any court or otherwise howsoever, and notwithstanding any order of any court or other authority whatsoever, is required in the interests of justice or for the purpose of any public or other inquiry, or in the national interest, or in the interests of the person detained, in custody, or confined, the Minister may order that such person be taken to that place.
>
> (2) Any person in the course of being taken to any place under subsection (1) and whilst at such place shall be kept in such custody as the Minister may direct and whilst in that custody shall be deemed to be in lawful custody.

It can be seen that s 15 speaks of a removal from a place of detention to another place of detention. It is clear also that s 16 of the Act confers a discretion on the minister to order that a detainee may be taken to another place on proof *to the satisfaction of the minister* that the presence of the detainee at the place is required in the interests of justice or for the purpose of any public or other enquiry or in the national interest or in the interests of the person detained.

It was argued on behalf of the appellant, however, that because there is no provision in art 151 of the Federal Constitution for the procedure for removal of a detainee from a detention centre to attend an enquiry of the Advisory Board, the procedure under s 15 and 16 of the Act must be followed.

Talalla JC disagreed with this argument and said in his grounds of judgment as follows:

> I do not agree. To my mind, these applications having been argued on the basis that the applicants had a constitutional right to attend the proceedings before the Advisory Board it had to follow that they had a corresponding right to be removed from their respective places of detention and taken to attend before the board. The authority for the steps taken to give effect to those rights is the Constitution itself. Consequently there was no necessity for any order under either s 15 or s 16 of the Act.

There was in fact an earlier decision on the same issue by Wan Adnan J in *Tai Haai Yang* v *Timbalan Menteri Dalam Negeri & Anor*[3] reported in the *Malaysian Law News*, May 1990, p 325. Wan Adnan J's view is reproduced as follows:

> In my view it is not necessary to have the authorization of the minister to take the detainee out of the place of detention for the purpose of attending the review by the Advisory Board. It is the requirement of s 11 of the Act that the detention order of the applicant be reviewed by the Advisory Board. The applicant has a right to attend the review and that right cannot be denied to him. Section 16 of the Act is not meant for this situation. The power of the minister under s 16 is discretionary. It is only in a case where it is proved to his satisfaction that a detainee's presence at any place is required that he (the minister) may make the order authorizing the detainee to be taken to that place. It is not necessary to prove to the minister the necessity of the applicant's presence at the review by the Advisory Board of the detention order against him. He has the right to be present either in person or with his advocate. The minister has no discretion. Section 16 is meant for a situation where the presence of the detainee may be required for some other purpose and in a case where the minister may exercise his discretion.

We have no doubt that the views expressed by the last two learned judges reflect the correct interpretation of s 15 and 16 of the Act.

Section 16(1) gives a discretion to the minister which discretion he may or may not exercise depending on the facts of each case. It has however no application to an enquiry of the Advisory Board constituted under art 151 of the Constitution.

Appeal dismissed.

Solicitors: *Karpal Singh & Co.*

Reported by *Prof Ahmad Ibrahim*

Ang Ghee Seng v Minister of Home Affairs, Malaysia & Anor

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-145-90
HASHIM YEOP A SANI CJ (MALAYA), HARUN HASHIM SCJ AND LC VOHRAH J
24 OCTOBER 1991

Preventive Detention — Detention order — Validity — Typographical error in detention order — Detention in police custody during journey to place of detention — When journey completed — Dangerous Drugs (Special Preventive Measures) Act 1985, ss 6(1) and 6A(1)(a)(iii)

Preventive Detention — Typographical error — Spelling error in detention order — Whether order defective

The appellant against whom a detention order had been made was brought to the Pusat Pemulihan Akhlak, Muar where he was to be detained for two years. The detention order was dated 30 April 1990. The centre however refused to accept him because there was an error in the spelling of his name. The appellant was kept in police custody until 5 May 1990 and after the correction was made he was sent to and received by the said detention centre. It was argued in this case that his continued detention was unlawful as (a) the detention order was rendered defective by reason of the spelling error being corrected after the expiry of the 60 days prescribed by s 3(2) of the Dangerous Drugs (Special Preventive Measures) Act 1985; and (b) the detention in police custody for five days pending the correction of the spelling in the detention order was unlawful as the journey had been completed when the appellant reached the rehabilitation centre and his continued detention other than at the centre after the completion of the journey could be unlawful and not covered by the new s 6A(1)(a)(iii) of the Act. The learned judicial commissioner dismissed the application of the appellant and the appellant appealed.

Held, dismissing the appeal:

(1) The error in this case was clearly typographical and the validity of the detention order was not affected by the typographical error.

(2) The new s 6A(1)(a)(iii) of the Dangerous Drugs (Special Preventive Measures) Act 1985 makes it clear that no detention order shall be rendered invalid or inoperative by reason that the subject was during the duration of the detention order on journey in police custody (or any other custody) to the place of detention referred to in the detention order. The journey is completed only when the detainee is received by the rehabilitation centre.

[Bahasa Malaysia summary

Perayu yang terhadapnya perintah tahanan telah dibuat telah dibawa ke Pusat Pemulihan Akhlak, Muar, di mana ia akan ditahan untuk dua tahun. Perintah tahanan itu bertarikh 30 April 1990. Pusat itu enggan menerima perayu kerana terdapat kesilapan di dalam ejaan namanya. Perayu kemudiannya disimpan dalam tahanan polis hingga 5 Mei 1990 dan selepas kesilapan itu diperbetulkan ia telah dihantar dan diterima oleh pusat pemulihan akhlak itu. Telah dihujahkan di dalam kes ini bahawa tahanan se lanjutnya tidak sah oleh kerana (a) perintah tahanan itu telah tercacat oleh kerana kesilapan ejaan nama itu telah diperbetulkan selepas tamatnya 60 hari yang ditetapkan oleh s 3(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985; dan (b) tahanan di dalam tahanan polis untuk masa lima hari sebelum pembetulan ejaan nama di dalam perintah tahanan itu adalah tidak sah kerana perjalanan telah tamat apabila perayu sampai di pusat pemulihan itu dan tahanan lanjutan selain daripada di pusat itu selepas tamat perjalanan itu mungkin tidak sah dan tidak termasuk di bawah s baru 6A(1)(a)(iii) Akta itu. Yang arif pesuruhjaya kehakiman menolak permohonan perayu dan perayu telah membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Kesilapan di dalam kes ini jelas adalah kesilapan taip dan kesahan perintah tahanan itu tidak terjejas oleh kesilapan taip itu.

(2) Seksyen baru 6A(1)(a)(iii) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 menjelaskan bahawa perintah tahanan tidak dijadikan tidak sah atau tidak berkesan oleh kerana orang yang berkenaan itu pada masa perintah tahanan itu berada di dalam perjalanan di bawah tahanan polis (atau tahanan lain) untuk dibawa ke tempat tahanan yang disebut di dalam perintah tahanan itu. Perjalanan itu hanya tamat apabila orang tahanan itu diterima oleh pusat pemulihan itu.]

Case referred to

1 *PP* v *Koh Yoke Koon* [1988] 2 MLJ 301 (refd)

Legislation referred to

Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3(2), 6(1), 6A(1)(a)(iii)

Appeal from: Criminal Application No 44-63-90 (High Court, Penang)

Karpal Singh for the appellant.
Suriyadi bin Halim Omar (Senior Federal Counsel) for the respondents.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): The appellant was the subject of a detention order under s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act') whereby he was ordered to be detained for a period of two years at the Pusat Pemulihan Akhlak, Muar, Johore.